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# THE POLYGAMY AND DIVORCE BILLS.

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**Reform proposals:—**

Quite a number of Bills (L. A. Bill, 23 of 1938; C. of S. Bills, 3 and 4 of 1938) designed to amend and modify the Hindu familial law in various directions are at present before the Central Legislature. They are intended to regulate if not altogether to abolish polygamy and also to introduce the institution of divorce among Hindus. The question arises whether there is any necessity for such legislation and if so on what lines it should proceed. In this connection it is salutary to remember that:

"The institution of marriage is the first act of civilisation and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws[1]."

In the words of Lord Russel of Killowen:

"It is in the interests of the State that family life should be maintained, and that homes should not be broken up by the dissolution of the marriage of parents. But even in the absence of children, it is in the interest of the State that if possible the marriage tie should remain stable and be maintained[2]."

**Early Hindu marriage ideal:—**

Marriage among Hindus took on a sacred character from the Vedic times. It was a lifelong union where the wife was regarded as a gift from the Gods[3], an associate in religious observances and a partner in the joys and sorrows of life.

1. *Noice* v. *Brown*, 20 Am. Rep. 388.
2. *Fender* v. *Mildmay*, (1937) 157 L.T. 340 at 348.
3. Rig. Veda, X, 15, 36.

Polygamy was not allowable according to the spirit of the law and a second wife was styled a wife not for duty but for lust. When in course of time the political integrity of the Aryans came to be assailed by frequent foreign invasions raising apprehensions regarding the security of their racial and cultural purity the marriage laws were stiffened; pre-puberty marriages for women were ordained and second marriages deprecated. This resulted in a disparity in the marriage laws between the sexes. The rules were, however, acquiesced in and acquired all the sanctity attaching to tradition.

**Causes of discontent:—**

Indian social life was till recently practically closed to all outside influences. Ancient traditions remained unassailable and the cake of custom was found hard to break. The advent, however, of newspapers, telegraph and telephone, air-travel and the radio brought about an annihilation of time and distance. The glamour of western civilisation, the equality of status achieved by women in Europe and America in the political and other spheres and the scepticism as regards the value of religion engendered by its failure to avert the cataclysm of 1914 all produced their repercussions and these coupled with the increasing deterioration in the observance of the rules of varna-asrama dharma, the growing divorce between precept and practice in actual life and the perpetuation of forms and ceremonials whose spirit had already fled, have produced a ferment in Hindu social life with a demand for a revision of our sense of values and a readjustment of our laws.

**Factors to be remembered:—**

Hindu opinion in the matter of reform of marriage laws may be said to run on three different lines. At one end there are people who regard marriage as a purely religious concern outside the pale of any legislation. At the other end are people who are critical and rationalistic in outlook, regarding marriage as a contract whose incidents can be regulated by statute. Neither of these classes asks for any special reform at present of the marriage laws, the former because of its disbelief in the competency of the legislature in this behalf, and the latter because of the existence of the Special Marriage Act of 1872 attracting to marriages under its auspices

the provisions of the Indian Divorce Act and the Indian Succession Act. In between these two classes there exists a body of people who are not sceptical enough to repudiate the religious character of marriage nor willing enough to accept all its implications, people who will not tolerate a marriage without rituals but do not desire it to be indissoluble under all circumstances. It is this body of people whose views have to be met.

**Shastraic rules:—**

Under the Shastras, as regards men, in spite of the eulogy of monogamy, polygamy was permitted[1], usually through anuloma alliances[2]. According to the texts:

"Three wives are allowed to a Brahmana in accordance with the order of castes. Two to a Kshatriya and one to a Vaisya. One Sudra wife besides, to all, according to some teachers without using mantras[2]."

Even within the caste a man was allowed to marry a second wife under certain circumstances. A text of Manu[3] indicates that originally it was permitted only after the death of the first wife. According to Apastamba a second wife cannot be taken while the first wife was willing and able to perform her share of religious duties or if she bears sons and it was only where she was deficient in either of these qualities that a second wife could be married[4]. Subsequently the category of exceptions was enlarged and the Shastras declared[5]:

"She who dri nks spirituous liquor, is of bad conduct, rebellious, diseased, mischievous or wasteful may at any time be superseded by another wife.

A barren wife may be superseded in the eighth year, she whose children all die in the tenth, she who leaves only daughters in the eleventh, but she who is quarrelsome without delay."

Even where a second wife was permitted in one's own caste the first wife alone, if blameless, was to be associated in all religious works[6]. In still later times polygamy became a matter controlled exclusively by caprice and economic factors.

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1. Ait. Br. III, 2, 12.
2. Paraskara Grihya Sutra, cit., on p. 831 of Ghose's Hindu Law, 3rd Edn., Vol. I; Vishnu, cit., on p. 846, *ibid.*; Vasishtha, cit., on p. 849, *ibid.*
3. V, 168.
4. II, 5, 11, 12-13.
5. Manu, IX, 77-82.
6. Vishnu, cit., on p. 846 of Ghose's Hindu Law, 3rd Edn., Vol. I.

As regards women the Shastras prohibited polyandry.[1] A second marriage was according to some permissible on the death, asceticism, degradation, or impotency of the husband or desertion on his part.[2] It is however doubted whether the texts contemplated a remarriage after the first marriage has been completed in all its stages, or after a betrothal merely. According to Kautilya marriages contracted in accordance with approved forms could not be dissolved but divorce could be had in some cases where the marriage was in the unapproved forms and remarriage permitted.[3] While the rules were gradually relaxed in the case of males they were stiffened regarding women. "Once alone is a maiden given in marriage," and "neither by sale nor by repudiation is a wife released from her husband"[4], said the Shastras. To prevent as far as possible undesirable alliances it was laid down:

> "The hunch-back, the dwarf, one born blind, the impotent person, the lame and one afflicted with distressing incurable disease—to all these persons abstinence from marriage is surely enjoined for life[5]."

A marriage in contravention of this and like injunctions, will, however, not be a nullity but will justify the wife in living apart from the husband in most of these cases. It was also laid down that on supersession a superseded wife should be provided for by the husband[6], and such provision may go up to a third of the husband's property. Monogamy, remarriage after wife's death, remarriage during her life time if she bore no son, remarriage under certain other circumstances as well, and finally remarriage at will have been the successive stages in the development of the rules relating to marriage of males. While prohibition of marriage by disqualified men gave place to rules tolerating them but conceding to the wife the right to live apart, remarriage by women was made impossible.

**Criticism of the rules:—**

Disparity thus resulted in the marriage laws as applicable to the two sexes. The theory of marriage being a lifelong union sat lightly upon man in that despite the absence of divorce

1. Ait. Br. III, 2, 12.
2. Narada, XII, 97-101; Vasishta, XVIII, 13; Katyayana, cit., Col. Dig., II, 171; Devala, cit., *ibid.* 165.
3. Arthasastra, III, 3 and 4.
4. Manu, IX, 45-47.
5. Vishnu, cit., on p. 847 of Ghose's Hindu Law, 3rd Edn., Vol. I.
6. Manu, IX, 77-82; Yajnavalkya, II, 148.

he can always discard a wife and take another at his inclination, whereas it worked hardship in the case of a woman as she can never get out of a union under any circumstances whatever. Further the safeguards provided against any arbitrary supersession of a wife have proved illusory in practice. For a second marriage is regarded as valid by the Courts under whatever circumstances contracted and the rule regarding the giving of a solatium to the superseded wife has never been effective due to its indefiniteness. Also remarriage by the husband is not accepted by the Courts as a ground entitling a wife to live apart from him.

Lines of reform:—

At the same time it has to be remembered that public opinion has always viewed marriage as a religious tie, cemented by mantras, incapable of being sundered, and hence will not easily reconcile itself to the sanctity of the institution being violated by the intrusion of divorce. Any reform, therefore, of the marriage laws, if it is not to remain a dead letter, must take note of this factor. Since the enactment of the Child Marriage Restraint Act, it can't be said that the bride is not a girl who has attained her discretion and as such capable of making her wishes in the choice of a husband respected, thereby minimising to a large extent the chances of incompatible and unequal alliances. The prevalence on a large scale of the practice of adoption eliminates the necessity for taking a second wife for the sake of male progeny, which according to the Shastras was the main ground for a second marriage. Polygamy at will being opposed to the Shastras there can be no legitimate objection to its being rendered punishable by statute. A statutory rule making it an implied condition of every marriage that a wife on being discarded unjustifiably by her husband will be entitled to a provision analogous to mahr among Muslims but more definite in character and easily enforceable will operate as a salutary check against any arbitrary conduct on the part of the husband. Even if a second marriage were to be permitted in exceptional cases as where the first wife is insane or is afflicted with hideous diseases, a similar safeguard may be provided for the first wife. The argument that suppression of polygamy means the promotion of immorality is without validity; for no one will admit that the morals of women have become affected by the age-long denial to them of

the right to remarry under any circumstances, and what is true of women in this respect must be equally true of men.

**Dr. Deshmukh's Divorce Bill:—**

[L. A. Bill 23 of 1938.] Dr. Deshmukh's Divorce Bill in the Legislative Assembly seeks to achieve for Hindu women what has become possible in England under the Matrimonial Causes Act, 1937. It purports to confer a right of divorce on women exercisable on (*i*) impotency, (*ii*) apostacy, (*iii*) second marriage, or (*iv*) desertion for a continuous period of three years by the husband. The Bill proceeds on the principle that what is good for England must be good for India and makes no allowance whatever for the difference in outlook and facts of life as they obtain in the two countries. It gives the right of divorce to women only, under the cloak of conferring on them equality of status with men. No woman of good family or sensitive feeling would rush to the Court for relief on any of the grounds stated in the Bill. The Bill if passed into law is bound to remain a dead letter but will have succeeded in depriving the Hindus of a matter which was justly a source of pride to them, namely, that theirs was a conception of marriage unique, sanctified by religion, lasting for ever, wherein no sordid consideration intrudes and which is intended to be a training in dharma.

**Mr. Susil Kumar Roy Chowdhury's Bill:—**

[C. of S. Bill 3 of 1938.] Mr. Chowdhury's Bill in the Council of State aims at regulating polygamy in British India by penalising it except under certain circumstances. The Bill allows liberty to remarry where the first wife is (*i*) permanently invalid, or (*ii*) insane, or (*iii*) suffering from incurable and loathsome diseases, or (*iv*) unchaste, or (*v*) living away from the husband's protection unjustifiably, or (*vi*) unfit without grave injury to her to fulfil her marital obligations habitually. The Bill provides that before remarrying a person must obtain the sanction of Court. The Bill is unnecessary and is bound to operate as an irritant. The Statement of Objects and Reasons appended to the Bill concedes that the percentage of polygamous marriages is very small but states that the very possibility that the husband can marry without any reasonable and probable cause lowers the position of women in this country. There is no halfway house between monogamy

and polygamy and the recognition of special circumstances as entitling a man to marry a second wife will result often in the manufacture of evidence against an unwanted wife and her being harassed and humiliated by all sorts of enquiries. Far from protecting women and elevating their status, the legislation if made, would defeat its very purpose.

**Mr. G. S. Motilal's Bill:—**

[C. of S. Bill 4 of 1938.] The Bill introduced by Mr. Motilal has the merit of simplicity. It prohibits polygamy outright and makes a second marriage during the subsistence of an earlier marriage an offence under Ss. 494 and 495 of the Indian Penal Code. The principle, if accepted, would ensure equality between the sexes in the matter of their marriage laws. In view, however, of the dependency of women on their husbands for their maintenance and the practical impossibility of a woman who has gone through a form of marriage once, obtaining a proper husband again by reason of the social sentiment operating against her it will be well to drop the provision in the Bill regarding the invalidity of the second marriage.

**Mrs. Radhabai Subbarayan's Bill:—**

The Bill proposed to be introduced by Mrs. Radhabai Subbarayan in the Central Legislative Assembly contains two sets of provisions, namely, (*i*) the prohibition of polygamy and (*ii*) the conferment of a right of divorce at the instance of either spouse under certain circumstances. Under S. 3, a person having a husband or wife living shall not during the lifetime of such husband or wife marry again unless the previous marriage has been dissolved, and any person marrying in contravention of that rule shall be deemed to have committed an offence under S. 494 or 495 of the Indian Penal Code, and such subsequent marriage shall be held to be void. Under S. 4 either spouse can present a petition to the Court for dissolution of marriage on the ground (*i*) that the other spouse has for a continuous period of five years been suffering from an infectious or incurable disease, or a loathsome venereal disease or virulent leprosy or incurable lunacy; or (*ii*) that there has been desertion by the other spouse unjustifiably for a continuous period of five years; or (*iii*) that the other spouse has been guilty of habitual adultery; or (*iv*) that the other spouse has been guilty of such habitual cruelty as would endanger health or safety.

The first set of provisions is almost identical with what is found in Mr. Motilal's Bill and is unexceptionable except in so far as it seeks to render void the second marriage in all cases. As already pointed out such a provision is not called for at present, in a case where the offender is a man, inasmuch as under our existing social conditions the woman who is the victim of such a marriage will always have to suffer if the marriage was annulled, particularly where it is done after the parties have lived together as man and wife for some time.

Regarding the second set of provisions, the criticisms urged against Dr. Deshmukh's Divorce Bill will almost equally apply here. It is not so much a question of alleviating distress as of removing the root causes, that has to be tackled. The Statement of Objects and Reasons mentions that the Bill is called for because:

"There are numerous instances where a man who is already married has married a second wife without any reasonable justification, ill-treated his first wife or otherwise caused her untold misery and unhappiness."

If polygamy is rendered an offence, if the provisions of the Child Marriage Restraint Act are strictly enforced, and if a provision analogous to mahr is implied as a condition of every marriage many of these grievances will disappear and equality practically ensured between the sexes regarding the marriage laws.

There are certain other criticisms to which the Bill is open. It is difficult to see why any distinction should be made between habitual adultery and occasional misconduct, particularly where the latter act is deliberate, as a ground for divorce. Enquiry in Court relative to matrimonial unhappiness and the reasons therefor, far from enhancing respect for the marital tie will lead to its being regarded as a mere contract and no more. It will often result in the fabrication of evidence to sully the fair name of the unwanted spouse and to achieve that person's permanent humiliation. From the point of women, if the average wife seldom takes advantage of the right available to her under the existing law, to claim maintenance from the husband in cases where she has been obliged to live apart on account of his cruelty or other justifiable cause, because of the fear of publicity and a natural disinclination to have her marital unhappiness made the subject of a judicial adjudication, it will be much more so

where it is a question of making and proving more unsavoury allegations. Above all, when all is said and done, polygamy is rare and cases of marital unhappiness due to oppression by the husband are not very frequent. The remedy proposed by the Bill is out of proportion to the evil sought to be relieved against.

**Conclusion :—**

It may, in conclusion, be stated that no reform of our marriage laws will be successful in any appreciable degree if it does not recognise that marriage is a lifelong union cemented by religion, and indissoluble in character. Polygamy may be heavily penalised and thereby rendered practically impossible. A suitable statutory provision definite in character and easily enforceable may be made in favour of the wife as an incident of every Hindu marriage, to protect her against any arbitrary desertion by the husband and to operate as a check even against the creation by him of circumstances compelling her to live apart. The adoption of these measures coupled with the better enforcement of the provisions of the Child Marriage Restraint Act will eliminate many of the root causes of the evils sought to be remedied by the various Bills now before the Central Legislature and at the same time preserve to the Hindus their distinctive conception of marriage.

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## SUMMARY OF ENGLISH CASES.

HERNIMAN *v.* SMITH, (1938) A.C. 305.

*Malicious prosecution—Reasonable and probable cause—What is—Rule in* Hicks *v.* Faulkner—*How far correct—Functions of the judge and jury.*

*H* (plaintiff) together with one *R* was charged with conspiracy to defraud *H. S.* (the defendant) and with obtaining money from him by false pretences. On the information of *S* they were charged before the justices at *E*,committed for trial to the Central Criminal Court, tried there by the Recorder and convicted. On appeal, the Court set aside the conviction, being of opinion in the case of *H* that there was not a sufficient case to go to a jury. Plaintiff *H* was found to be innocent but the question was as to the effect on *S's* mind.

*Held*, that reasonable and probable cause is as defined by Hawkins, J., in *Hicks* v. *Faulkner*, (1878) 8 Q.B. 167 at 171, "an

honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed". The question of the defence of reasonable and probable cause is for the Judge. To ask the general question whether the defendant took reasonable care to inform himself of the true state of the facts is, in many cases, to ask the jury what the Judge has to decide for himself. The facts upon which the prosecutor acted should be ascertained. When the Judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused. In so far as Hawkins, J., in *Hicks* v. *Faulkner*, (1878) 8 Q.B.D. 167 says at p. 172 that the reasonableness of the accuser's belief in the existence of the facts on which he acted is a question of fact for the jury not approved. That question together with the question whether the facts so believed amount to reasonable cause for believing the accused to be guilty, are for the Judge.

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PATON *v.* INLAND REVENUE COMMISSIONERS, (1938) A.C. 341.

*Income-tax—Income-tax Act, 1918, S. 36 (1)—Loan from bank—Account debited with interest—If payment of interest from customer to bank so as to fall under S. 36 (1).*

*H. F.* had a total income of 26,301*l.* Out of the income certain charges were paid. They were all deducted. There was a balance of income of *7,777l.* after allowing for these charges. *H. F.* had borrowed from *M* bank 250,000*l.* on security. Up to the date of hearing nothing had been paid on that account either for principal or for interest. But the interest was being debited by the bank to the loan account each year and added to the principal. The question was if "in view of the bank's practice of adding the interest of each half-year to the amount advanced, the interest had in fact and in law been paid each half-year" and further "to the extent that *H. F.* had taxed income for the year in question, the interest must be deemed to have been paid out of profits or gains brought into charge and tax within S. 36 of the Income-tax Act".

S. 36, sub-S. (1) of Income-tax Act, 1918, provides that "where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the

satisfaction of the Special Commisoners, to repayment of tax on the amount of the interest".

*Held,* that in the circumstances there was no ground for holding that the interest in question was paid by *H. F.* All that has happened is that, because the interest has not in fact been paid, the creditor has added the amount of the unpaid interest to the debtor's principal indebtedness. Interest which is so dealt with cannot be interest 'paid to the bank', still less can it be interest "paid to the bank without deduction of tax out of profits or gains brought into charge" within the meaning of S. 36.

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THE LORD ADVOCATE *v.* INZIEVAR ESTATES, (1938) A.C. 402.

*Customs and Inland Revenue Act, 1889—Estate duty—Life assurance policy—Assignment of during life—Some premiums paid by assured even after assignment—Basis for estate duty—Proportion payable.*

In 1910 *S* took out a policy of assurance on his own life for 20,000*l.* The annual premiums thereon was payable on April, 1930, in each year. In 1925, *S* assigned the policy to the respondents gratuitously. 14 premiums had by then been paid regularly by *S*. *S* died in April, 1935. After the assignment also, *S* paid four annual premiums and thereafter till his death the respondents paid the seven premiums. On death of *S* the policy amount of 21,800*l.* was paid to the respondents. The question was as to the amount of estate duty payable, namely, whether it is to be 4/25 or 4/11 of the policy amount. S. 11, sub-S. (1) of Customs and Inland Revenue Act, 1889, provides that "the charge under the said section (that is, S. 38 of Act of 1881) shall extend to money received under a policy of assurance effected by any person dying on or after 1889 on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit".

*Held,* the meaning of the sub-section is that "where the policy is partially kept up by such person for the benefit of a donee whether nominee or assignee, the charge shall extend to a part of the policy moneys in proportion to the premiums paid by that person". The proportion designated in the sub-section is the proportion in which they have paid such premiums after the donation, that is, 4/7th. The language shows that the proportion is to be determined by events which take place after the donation.

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COMPANIA NAVIERA VASCONGADO *v.* STEAMSHIP "CRISTINA", (1938), A. C. 485.

*International law—Ship of Spain—Ship in English port—Possession of ship taken by Spanish Government—Claim by the private owner of the ship for declaration of ownership and for possession—If maintainable.*

A Spanish company, carrying on the business of ship owners at Bilbao in Spain, initiated an action for a writ *in rem* claiming as sole owners of S. S. "Cristina" for a declaration of ownership and for possession. The "Cristina" is a Spanish ship. She was lying at Cadiff dock, where she had arrived under the charge of a Captain F. appointed by the shipowners. As the Captain F. failed to obey a decree of the Spanish Government, the Consul dismissed him and put a new master appointed in the name of the Government. Since the new captain took charge the ship's expenses had been disbursed by the Spanish Government. The shipowners (company) then issued this writ *in rem* claiming as owners. The respondent (Spanish Government) entered a conditional appearance and stated that they were the owners or parties interested and also moved for the writ and all subsequent proceedings thereon being set aside inasmuch as it "impleads a foreign sovereign state, namely, the Government of Spain".

*Held*, that the Spanish Government was in fact impleaded and they were intended to be so impleaded. The order sought in the present case would necessarily displace the *de facto* possession of the Spanish Government. No such writ can be upheld against the foreign sovereign state unless it consents, because a sovereign state cannot, directly or indirectly, be impleaded without its consent.

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REFUGE ASSURANCE COMPANY, LIMITED *v.* PEARLBERG, (1938) 1 Ch. 687.

*Mortgage—Law of Property Act, 1925—Mortgagee entering into possession—If can appoint a receiver to take possession.*

It is open to a mortgagee to exercise the power given to him under S. 101, sub-S. 1 (3) of the Law of Property Act, 1925, to appoint a receiver of the income of the mortgaged property or any part thereof, even after he has gone into possession of the properties. The words in which the power to appoint a receiver is expressed are clear words which are not limited so as not to apply where the mortgagee is in possession at the date when he makes the appointment. On such appointment, the mortgagee must be treated as having gone out of possession without any further liability to account on the footing of wilful default.

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LEWIS *v.* CATTLE, (1938) 2 K. B. 454.

*Official Secrets Act, 1911, S. 2, sub-S. (1)—Police officer—If a "person who holds office under His Majesty".*

The Official Secrets Act, 1911, S. 2, sub-S. (1) provides that "If any person having in his possession or control any . . . information . . . which has been entrusted in confidence to him by any person holding office under His Majesty . . (*a*) communicates the . . . . information to any person, other than a person to whom he is authorised to communicate it, . . . that person shall be guilty of a misdemeanour", and Official Secrets Act, 1920, S. 6 provides that "It shall be the duty of every person to give on demand to a chief officer of police, or to a superintendent . . . any information in his power relating to an . . offence under the Principal Act (1911) . . . he shall be guilty of a misdemeanour".

The appellant was a journalist in employment on the staff of *D.D.* newspaper and the respondent was a superintendent of police of borough *S.* A warrant for arrest of a man *T.M.* was issued by *S* borough police and information was circulated by *S* police to other police forces. A paragraph almost identical with the police circular appeared in the *D.D.* newspaper written by the appellant. The circular was only for police use and confidential. The respondent (superintendent of *S* police) called on the appellant and asked him to disclose the name of his informant under S. 6 of the Official Secrets Act, 1920. He declined and contended that a police officer, who communicated the information to him was not "a person who holds office under His Majesty".

*Held*, that every police officer in England and Wales, whether he be a member of the Metropolitan Police Force, or a member of the Police force of a county, city or borough, holds the office of a constable, and within his constablewick he has all the duties and rights conferred by common law or statute on the holders of that office. He is required to take an oath of office and his primary duty is to preserve the King's peace. He is therefore "a person who holds office under His Majesty" within the meaning of the Official Secrets Act.

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PRATT *v.* A. A. SITES, LIMITED, (1938) 2 K. B. 459.

*Justices—Summary jurisdiction—Justices deciding that they had no jurisdiction—If can nevertheless state a case.*

Once the justices expressed the view that they had no jurisdiction to hear certain complaints which were before them, they have thereafter no jurisdiction to state a case for the opinion of the

superior Court. The proper course is for the aggrieved party to apply for a rule by way of mandamus calling on the justices to hear the case, and not for the justices to state a case.

*Wakefield Local Board* v. *West Riding Ry. Co,* (1866) 30 J. P. 628, followed.

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ALLEN *v.* TREHEARNE, (1938) 2 K. B. 464.

*Income-tax—Income-tax Act, 1918; Sch. E—Finance Act, 1927, S. 45 (5) and (6)—Sum payable to employee on termination of service—Service terminated by death of employee—Assessment on executors—Basis of.*

One *M* was in the employment of a company under a service agreement under which he was appointed managing director for a period of 10 years from 1—8—1930. It contained provisions for determination of the agreement by notice on either side. In addition to salary, the agreement provided for payment of "a terminal sum of 10,000*l* . . . to be payable by the company to the managing director or his personal representatives upon the termination from any cause whatsoever (other than wilful default of the managing director in the performance of his duties) of his service with the company". *M* died on 17—1—1934. He became entitled to the 10,000*l* and that was paid to the executors of *M* on 5—7—1934. An assessment was made on the executors in respect of that sum under Schedule E for the year ending April 5, 1934. The question was if the executors were assessable.

*S. 45 (5).*—"Where in any year of assessment a person ceases to hold an office or employment or to be entitled to an annuity, pension or stipend chargeable under Sch. E, tax shall be charged for that year on the amount of his emoluments for the period beginning on the sixth day of April in that year and ending on the date of the cessation. . . . .".

*S. 45 (6).*—"In the case of the death of a person in whose case, if he had not died, tax would, under the provisions of the last preceding sub-section, have become chargeable for any year, the tax which would have been so chargeable shall be assessed and charged upon his executors or administrators, and shall be a debt due from and payable out of his estate."

*Held,* that this was remuneration, though the occasion when it became payable is the death of *M*. It is therefore in the nature of an income payment and subject-matter of Schedule *E*. It is assessable under S. 45 cl. (6). Under that clause what the commissioners have to see is "whether if the person had not died, tax would have become chargeable under sub-S. (5) in the circum-

stances which have happened. They are not directed to make any other supposition except that the deceased has not died. For the rest, the facts which have actually happened, namely, that he has ceased to hold office and has received or become entitled to certain emoluments, must be looked to and the same tax charged upon his executors as would have been charged upon him".

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LLOYD *v.* LLOYD AND LEGGERI, (1938) P. 174.

*Divorce—Adultery of wife—Husband conniving at it—Later adultery with knowledge of husband—Husband tolerating it—If later can apply for divorce.*

At the time of the marriage in 1928 the husband was a divorced man and the wife was a widow who was then living with two men as their mistress. After the marriage the parties came to India and the wife committed adultery with one *K*. The husband knew of that fact afterwards. Again when the husband was ill she committed adultery with one *M* and after the adultery the husband knew of it. The husband returned to England with her and expected she would thereafter behave better. In 1935 she was living as the mistress of one *L* and the husband became aware of it and begged his wife to give up her association with *L*. She did not heed. During week ends she came to her husband and lived with him as husband and wife. Finally in 1936 the husband applied for divorce on the ground of her adultery with *L*.

*Held*, the petitioner was not entitled to divorce. He knew of his wife's adultery with *L* and permitted it and sought the Divorce Court only when he found that her affections had passed from him more to *L*. It fell within *Gipps* v. *Gipps and Hume*, (1864) 11 H. L. C. 1, and the petitioner was guilty of connivance.

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## JOTTINGS AND CUTTINGS.

*The Week's Personality.*—Thorough competence generally leads a judge to the speediest oblivion, since cases calmly conducted to an uneventful and satisfactory conclusion rarely provide much in the way of wit, anecdote or sensation, in short, anything that the world at large would care to talk about. That is why nobody remembers anything about Lord Chief Justice Eyre, who, in his day, was a model of the highest judicial qualities. He was impartial. "Though he soon discerned the merits and foresaw the issue of a cause he never betrayed any impatience nor relaxed his attention. It was scarcely possible to discover the opinion which he had formed before the moment when he was called upon

to deliver it publicly". He was dignified. "He was convinced that the observance of solemnity in the Courts of Justice contributed to excite veneration for their proceedings. His judicial deportment, therefore, was calculated to convey an impression of awe and respect. But though his manner was grave and punctilious, it was marked with the greatest courtesy". His decisions excited acknowledgment even from unsuccessful parties that their cases had been fairly, fully and dispassionately determined. His knowledge of law was based on broad principle and was skilfully applied. In short, he was an excellent judge.—*S.J., 1938, p. 563.*

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*Plain Words.*—"A grave sin against justice and the honour of this Court". "Statements made without warrant, evidence or justification". It is a long time since it was fashionable for such resounding phrases to be addressed by well-known leaders to the Bench, and they must have fallen amazingly on the ears which heard them during a recent sensational case at Gibraltar. In Ireland, of course, at various periods, a sort of civil war has raged between the judges and the Bar. There was no foreseeing what men like O'Connel or Curran would think fit to say. "Good God! My Lord", the former once said to a judge who had taken a day to think over a point, "if your lordship had known as much law yesterday morning as you do this, what an idle sacrifice of time and trouble would you not have saved me, and an injury and injustice to my client". It is well within living memory that O'Brien, J., sitting as the ultimate Court of Appeal in the County Court cases carried to the assizes, said that there was a reason why certain authorities could be distinguished. "I know the reason", interrupted counsel, "it is because there is no appeal from your order and you can do injustice with impunity". The judge only said: "Your ould father was the most impudent man in Cork, but you're worse than him", and finished his judgment.—*S.J., 1938, p. 563.*

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*When Counsel were Bold.*—A century and less ago there were fierce counsel at the English Bar who tolerated little. Take the following passage of arms during a witness's examination. Park, J., "That's a very improper question." Sgt. Taddy: "That is an imputation to which I will not submit. I am incapable of putting an improper question." Park, J.: "That is a very improper manner for a counsel to address the Court in." Sgt. Taddy: "And that is a very improper manner for a judge to address a counsel in". Park, J.: "I protest, sir, you will compel me to do what is disagreeable to me." Sgt. Taddy: "Do what you like, my

lord". Park, J.: "I hope I shall manifest the indulgence of a Christian judge." Sgt. Taddy: "You may exercise your indulgence or your power in any way your lordship's discretion may suggest. It is a matter of perfect indifference to me." One of the last of that school of advocacy was poor Kenealy, whose ill-considered attacks on Lord Chief Justice Cockburn during the *Tichborne Case* ultimately brought him to grief. The judge certainly had the last word when he characterised the language used as combining cowardice and insult. "If my name shall be traduced," he said, "if my conduct shall be reviled, if my integrity shall be questioned, I leave the protection of my memory to the Bar of England." —*S. J., 1938, p. 563.*

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*Judges at the Mansion House.*—The Lord Mayor's dinner to H. M. Judges on Tuesday was, as usual, a great function, the Lord Mayor (unfortunately without the Lady Mayoress who was indisposed) receiving the Judges not only of England but of the Empire. The L.C., the L.C.J., Law Lords, L.Js., Puisnes, County Court Judges and Metropolitan Magistrates—all were strongly represented; and not they only, but C. Js. and Puisnes from all parts of the Empire overseas. One of the most pleasing passages in the new Lord Chancellor's admirable speech was his reference to those Judges who, throughout the Empire, "administer honest and incorruptible justice". Lord Maugham knows more of the Continent and the continental point of view than any other of our Judges, and France, its language and its laws are to him familiar; and he was able to say that foreigners, speaking voluntarily and unanimously, expressed admiration for the Judges of England.—*L.J., 1938, p. 30.*

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*What Judges Cannot Do.*—As the journey is long and term is still in being, the Free State, Northern Ireland and Scotland were not, apart from Law Lords, represented at the Lord Mayor's banquet, but the Rt. Hon. the Lord Provost of Edinburgh, Sir Louis, S. Gumley, with the Lady Provost, were observed at the high table in the immediate vicinity of the President of the P. D. and A. Division. Otherwise the Home, Dominion and Colonial Judges were strongly represented, and over a score of overseas judges, most of them with their wives, had come, as the L. C. observed, "from all over the world". The longest journey, I believe, was that made by the Hon. Mr. Justice Smith, of the High Court of New Zealand, and Mrs. Smith.

As the years go by the speeches at this dinner grow shorter and shorter, and for brevity I think those of Tuesday night con-

stitute a record. Perhaps the briefest and the best was that of the L. C. J., who in his response to the Lord Mayor's toast of H. M. Judges was able to accept some praise on their behalf and for their services in applying the "force of law as contrasted with the law of force"; nor did he fail to admit their limitations, confessing that they could not "on all occasions and in every respect perform miracles". They had not yet discovered, for example, how to be in two places at once or how to hear cases before they are set down.

Lord Hewart is undoubtedly well and in his old best form; and after respectful observation of Lady Hewart, I share the view expressed some time ago by another observer that the cause of his youth renewed is mainly, if not wholly, matrimonial.—*L.J., 1938, p. 30.*

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*Lawyers are Good.*—It was Lord Atkin who proposed the toast of the legal profession, and he did it well, quoting from three authorities in support of his case and indicating by a well-known remark of Rousseau on the Life of Man how nasty, brutish (as well as short) life would be without the lawyers. In a company composed mainly of lawyers and their wives it is perhaps not surprising that his high and just estimate of the legal profession was accepted without audible indication of dissent by the attentive audience. The Attorney-General, held up by his duties in connection with the Administration of Justice Bill, No. 1, in the House, was unable to be present, but Sir Terence O'Connor, S.-G., at the banquet as so often in Court and Parliament, made a succesful deputy. He and Sir Francis Smith, President of the Law Society, made reference to the work done in Law Reform and in rendering free legal service for Poor Persons; and declared the readiness of the legal profession to do still more. Having heard all the words said, one formed a very favourable opinion indeed of the lawyers, and felt that they were good, but not too good to be true.

There was evidence, too, of personal harmony between the great men of our profession; and it would appear that L.C., L.C.J., Law Lords, President and Law Officers are on the best of terms and in complete accord as to the question of the Rule of Law.

As the Lord Mayor (Sir Harry Twyford), the Alderman (Sir Alfred Bower) and the Sheriff (Major Champness) so nobly entertained the Judges, speaking of their unrivalled quality as administrators of justice, and of the great business and high integrity of the merchants of London, I wondered why, having regard to the magnitude of business and the proximity and excellence of

the Judges, the Commercial Court is so depressed.—*L.J., 1938, p. 30.*

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*Impleading a Foreign Sovereign.*—Several cases recently have involved a consideration of the scope of the principle that the court will not entertain proceedings which implead a foreign sovereign State. Not the least interesting of them is *Haile Selassie* v. *Cable and Wireless Limited,* Mr. Justice Bennett's decision in which has just been reversed by the Court of Appeal. The matter arose out of a contract between the Director-General of Posts, Telegraphs and Telephones of Ethiopia and the defendant company relating to the transmission of wireless messages between radio-telegraphic stations situated respectively in Addis Ababa and Great Britain. The parties agreed at the hearing that the sum payable by the defendants under the contract was £10,613 11*s.* 3*d.*, and the matter to be decided was whether the plaintiff was entitled to recover judgment for that amount against the defendants having regard to the recent happenings in Ethiopia and to the attitude taken up by His Majesty's Government in relation to the plaintiff and to the rule of the Italian Government in Ethiopia.—*L.T., 1938, p. 21.*

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*The Decision.*—The learned judge found that the contract was made by the Director-General aforesaid on behalf of the plaintiff as the sovereign authority of Ethiopia, and that the rights and liabilities under the contract were not those of the plaintiff but of the Ethiopian Empire, of which he was the sovereign head. The Italian Government had made a claim to the sum in question, and his Lordship intimated that if he were to give effect to the plaintiff's argument, he would be indirectly deciding against the claim put forward on behalf of His Majesty the King of Italy to the moneys which the defendants admitted they owed under the contract sued on. He therefore held that he had no jurisdiction to decide the rights of the plaintiff and stayed all further proceedings in the action. The substantial defence to the action was that by reason of the conquest of Ethiopia by the armed forces of His Majesty the King of Italy, coupled with the recognition by His Brittannic Majesty's Government of the King of Italy as the *de facto* Sovereign of Ethiopia, the right to recover the sum from the defendants had become vested in the King of Italy. The learned judge declined to express any opinion on this point and ordered a stay of proceedings on the ground that the right of the plaintiff to recover judgment could not be determined without determining

whether the claim put forward on behalf of the King of Italy was well founded.—*L.T., 1938, p. 21.*

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*"Impleading Indirectly".*—As has already been stated, the Court of Appeal, (Sir Wilfrid Greene, M. R., Lord Justice Scott, and Lord Justice Clauson) reversed this decision. The Master of the Rolls said that the action was one to which the Italian Government was not a party and not a necessary party. The question which fell to be decided was whether or not the defendants were liable to the plaintiff and, although the claim of the Italian Government was one which, if made by a private individual, could have been dealt with in interpleader proceedings, no such proceedings were possible without the consent of Government. It was indicated that that fact could not deprive the plaintiff of his right to have his claim adjudicated on by the Courts of this country unless there was some rule of English law which precluded the courts from entertaining the claim, and that no such rule existed. The case did not involve bringing the foreign sovereign before the court in his ow person or that of his agent or interfering with his proprietary or possessory rights in the event of judgment being obtained. To say that where a foreign sovereign had made a claim the proceedings in effect amounted to impleading that sovereign was wrong. The expression "impleading indirectly" did not mean adjudicating on such a claim as was made by the Italian Government in the present case. It referred to such proceedings as Admiralty proceedings *in rem* when the action in form was an action against the ship. In this connection comparisons might be made between the present case and those of *The Cristina* and *The Arantzazu Mendi*. The appeal was, therefore, allowed and the action was remitted to the Chancery Division for hearing.—*L.T., 1938, p. 22.*

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*Sir George Talbot.*—The death is announced of Sir George Talbot, who, from 1923, when he was appointed as a Judge of the King's Bench Division to fill the vacancy caused by the retirement of Lord Darling, till last year, when he himself retired, was a very learned and able and courteous member of the Bench. At the Bar he attained a reputation as an ecclesiastical lawyer, and held a number of diocesan chancellorships, and, as Chancellor of Lincoln, he tried and gave judgment against Archdeacon Wakeford, a judgment which was afterwards affirmed on retrial upon appeal to the Judicial Committee. It was held, also, (1921, 1 A.C. 813; 90 L.J. P.C. 174) that a clergyman can be convicted in a criminal court only on evidence which would support a verdict of guilty in a criminal court. Ecclesiastical litigation is now rare, but in the case

of *Bowman* v. *Secular Society, Ltd.*, (1917, A. C. 406; 86 L.J. Ch. 568), Talbot showed his great learning in a similar field when, as counsel for the appellant, he argued that Christianity is part of the law of England. He had Lord Finlay, then Lord Chancellor, with him, but the contrary view was expressed by Lord Sumner in a well-known judgment, and was adopted by the rest of the House. Talbot when at the Bar had a large practice also in rating and local government cases, and on the Bench, besides being a very effective Judge in civil cases, he showed equal ability on the criminal side, a sphere till then less familiar to him. One of his cases was the trial of Alfred Rouse at Northampton in 1931 for murder—the "Burning Car" case. In learning and character Sir George Talbot well maintained the high traditions of the Bench.—*L.J., 1938, p. 37.*

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*Justice Cardozo.*—The fierce light that has been said to beat upon a throne has in the last few years beat upon the Supreme Court of the United States. The question has been whether on what we call here the "true construction" of that written document, the Constitution of the United States, it was possible to reconcile President Roosevelt's "New Deal" with its provisions. But to reconcile the terms of a paramount document a hundred and fifty years old, with the totally changed condition of social life now, implies a certain adaptability in the mental equipment of the judge. Some of the justices of the Supreme Court have had this adaptability in a marked degree, and have been known as the "liberal" element. Conspicuous among these was Justice Cardozo, who, we regret to see, died on the 9th inst. at the age of 66. He had made a lifelong study of the law and of the functions of a judge. His views were expressed in *The Nature of the Judicial Process*, published in 1921, and in *Paradoxes of Legal Science*, published in 1928; and he was able to act upon them when for many years he was a Justice, and then Chief Judge, of the New York Court of Appeals, until in 1932 he was appointed to the Supreme Court. It fell to him to write some of the notable judgments in 1937 when the liberal view of the Constitution was affirmed and the New Deal upheld; in particular in the Social Security Cases which upheld laws allowing Federal assistance to States unable to give essential relief to the old and the unemployed. "There was", he said in one case, "need of help from the nation if the people were not to starve". The cases were on the "general welfare" clause of the Constitution, a concept which he said in another judgment was not static. "Too old at forty" struck in him a note of sympathy, and "needs", he said, "that were narrow or parochial a century ago may be interwoven in our

day with the well-being of the nation. What is critical or urgent changes with the times". In describing in *Paradoxes of Legal Science* his personal conflicts in arriving at decisions, he said: "Suddenly a fog has lifted. I have arrived at a stage of mental peace". And he was a liberal not only in judgment, but in opinion. To him liberty of opinion was essential for the safety of the State. In this he ranked with Holmes and Brandeis as a trio of great judges.—*L.J., 1938, p. 37.*

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*Provocation.*—A case in the Court of Criminal Appeal this week brought up once more the question of provocation as an extenuation of murder. The appellant killed his wife, but it seems to have been accepted that, at the moment when he did so, he knew that she had murdered two of their children by strangling them. He even may have seen her do so before his eyes. Such terrible events do not, we are thankful to say, often occur; and it is no cause for surprise that the husband, when convicted of murder, came to the Court of Criminal Appeal. That Court, whatever its feelings, has only to see whether the Judge below charged the jury properly, and whether the evidence tendered was admissible. The conditions under which, when murder is charged, a jury may find a verdict of manslaughter on the ground of provocation are well known. No later judges have improved on Lord Tenterden's charge in *R.* v. *Lynch* (5 C. & P. 324), and Chief Justice Tindal's in *R.* v. *Hayward* (6 C. & P. 157). "Provocation so *recent* and strong that the prisoner might not be considered at the moment master of his own understanding". That is the test. But, so long as it is carefully explained to the jury, the question whether the defence is made out must be decided by them alone. The Court of Criminal Appeal is not there to disagree with them.—*L.J., 1938, p. 38.*

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*Damages for the Dead.*—We have now a fresh attempt by a judge of the highest reputation to assess damages for loss of expectation of life (*Aizkarai Mendi*, 1938, 3 All. E. R. 483). Mr. Justice Langton had to consider the case of a number of sailors and members of a crew who were drowned when their vessel, the *Boree*, was run down by the defendants' vessel. The defendants were found four-fifths to blame, and the Registrar, after having given generous sums under Lord Campbell's Act, proceeded to assess the value of life to the deceased men. This he put at the same figure for all of them, though their ages varied by as much as 20 years. The learned Judge thought this was wrong, and divided up the nine claims into three classes—roughly according as the deceased were in the 20's, the 30's or the 40's. We suppose it i

true to say that if two men are in the same occupation with the same risk and the same health, the younger is the more likely to survive, and in one sense is the heavier loser if both are killed together. On the other hand, the Registrar seems to have thought that if the pleasure of anticipation is larger in one case, the pleasure of retrospection is greater in the other. On that head, the older man loses more by the disaster of death. This is to us a new and original view: but we are far from saying it is incorrect. Men who drank 1834 port, or broke the Hindenburg Line in 1918, have memories which no luckless youngster can ever enjoy.—*L.J., 1938, p. 38.*

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*What is a "Workman"?*—An acute difference of opinion arose this week in the Court of Appeal. The question in issue was whether a nurse, while applying treatment in a hospital ward to a patient under the orders of the "sister" in charge of the ward, is a workman in the employ of the proprietors of the hospital (*Wardell* v. *Kent C. C.*, 1938,3 All E.R. 473). The County Court Judge had thought that the nurse's contract with the hospital was a contract for services but not a contract of service. She was, in his view, like the hypothetical music-master of whom Cozens-Hardy, M.R., spoke in *Simmons* v. *Heath Laundry Co.*, (1916) 1 K.B. 543, 548. Lord Justice Greer upheld this view, and was for dismissing the nurse's appeal. She might, he thought, be a workman when doing administrative work in the hospital, but was only a contractor for services when she was doing actual nursing work. The other two Lords Justices thought otherwise. Both when nursing and (*e.g.*) sweeping floors the appellant was under the orders of the respondents, whether they themselves gave them or appointed a deputy to do so. We cannot but regret that after so much litigation a point like this has not yet been settled. *Ryan* v. *Limerick R.D.C.* (13 B.W.C.C. 556) seems the nearest case; but is just on the other side of the line.—*L.J., 1938, p. 38.*

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*Lenient Justices.*—We often hear critics nowadays who say that magistrates appear unduly lenient in dealing with offending motorists. It is always risky for those who have not heard all the facts of a particular case to say that the hand of justice has not been firm enough. The case may not be fully reported, and extenuating circumstances, which may not be apparent on the surface, may exist. A case where the magistrates will undoubtedly be critised came before a Hampshire Bench this week (*Times*, July 13). Two youths pleaded guilty to charges of taking away a

motor-car without the owner's consent and to stealing two bicycles. One of the accused also pleaded guilty to driving without licence or insurance, and the other to aiding and abetting this offence. The police said that ten other charges of taking away cars could have been preferred, and it seems that it was the practice of these young men to break the law constantly in this way over a large area of Hampshire. In the circumstances, so far as shown, we should certainly say that they got off very lightly with fines of 50*s*. and a binding over for two years. The taking away of cars is a grievous offence against the owner and the State. When it is remembered that the joy-rider drives uninsured to the peril of third parties whom he may injure, his conduct assumes even a more serious aspect.—*L.J., 1938, p. 39.*

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*An Author's Dilemma.*—Not the least anxious of a novelist's tasks must be the choice of suitable names for his characters. As readers know, a person publishing libellous matter is deemed to intend the natural meaning of his words, and where a proper name is used in a work professedly, and genuinely, fictional, the natural meaning of an author's words may be very far from his intention. The question whether matter is libellous in such cases, as Lord Alverstone, C. J., indicated in *Jones* v. *Hulton* (1909), is one of fact for the jury, and that question of fact involves not only whether the language used in its fair and ordinary meaning is libellous or defamatory, but whether the matter would be understood by persons who knew him to refer to the plaintiff. One who recklessly publishes a libel apparently intended to refer to some real person has been compared to a man who fires a gun into a crowd. The analogy may not be in all things perfect, but it brings home forcibly the perils of the situation. Novelists would appear to be confronted with a choice of evils. If they select some common name for their unpleasant characters—and it is doubtful if any work of fiction at the present time would be a commercial proposition without its full complement of such persons—the number of potential plaintiffs is naturally considerable, though the danger of identification in readers' minds of the fictional character with one person bearing the name may be lessened. If, on the other hand, they select some unusual name—unless a combination of ingenuity and good fortune enables them to hit upon some appellation not borne by any member of the community—the chances of identification in the readers' minds is correspondingly increased. And these difficulties will remain in their several degrees in the infinite variety of choices falling between these two extremes.—*L. T., 1938, p. 40.*

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*A Recent Decision.*—In the recent case of *Canning* v. *William Collins, Sons, and Co., Limited*, the plaintiff, who bore the same name as an unpleasant character in a novel, complained that certain passages in the book imputed that he was a financial crook, a criminal, a cad, a seducer of women, and a person without any sense of morality. His real object in bringing the action was less to obtain any damages than to stop the circulation of the book, and to prevent people who had identified him with the character in question continuing to labour under that delusion. The plaintiff had retired from the Army in 1922 with the rank of captain—a rank accorded to the fictitious character—he had a sister named Mary, had hunted at one time, and was a fellow of the Zoological Society. He was, moreover, engaged in finance in the City of London, and in addition to the foregoing points of resemblance between him and the character, he was dark, powerful and broad-shouldered, and was in appearance about forty years old. He was baffled by certain impolite communications by telephone and postcard until the book was brought to his notice. It appeared that when the book was published neither the authoress nor the publishers had ever heard of the plaintiff, and the former explained that she chose the name "out of a history book". The Christian name was about as common a one as she could find, and she had taken the precaution of looking into the London telephone directory to see whether it was to be found there in conjunction with the surname she had chosen. Counsel argued that if people were to recover damages in the circumstances in which the plaintiff sought to recover them, either there would be no novels at all, or such novels as there were would have to deal exclusively with persons of the most exemplary character. The action was tried before the Lord Chief Justice and a special jury who returned a verdict for the defendants, and judgment was entered accordingly with costs.—*L. T., 1938, p. 40.*

*Lost.*—We are all familiar with the story of the man who asked his companion whether one could say of a thing that it was lost if one knew where it was, and who, on receiving a reply in the negative, promptly threw his companion's watch into the sea. The same question may well arise in connection with the anti-Jewish campaign in Germany. A Jew leaves Germany in haste, and with all his other possessions he leaves behind a share certificate relating to shares in an English company. The German authorities appropriate the certificate and refuse to part with it. The unfortunate exile writes to the English company and, it may be, asks for a new certificate. The company's secretary looks at his articles of association ; he probably finds that "if a share certificate is defaced,

lost, or destroyed, it may be renewed . . . . , on such terms, if any, as to evidence and indemnity, as the directors think fit (*see* Table A, art. 5), and at first blush he is likely to come to the conclusion that the certificate cannot be said to be defaced, lost or destroyed, and that a new certificate cannot be issued. The certificate is not, of course, "lost" in the common sense of "mislaid", but the concise Oxford Dictionary gives: "Be deprived of, cease by negligence, misadventure, separation, death, etc., to possess or have" as the primary meanings, and these certainly seem to cover the point. We shall be interested to see if the Court is ever asked to determine the question, for, if it were held that in these circumstances a share certificate was not lost, a number of difficulties might well arise.—*L.J., 1938, p. 124.*

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*Johnson Annoyed.*—No reader of Boswell can forget the account of the meeting between Johnson and Edwards, with whom he had been at college some fifty years previously. They had never since encountered each other till this particular meeting, though both were living in London nearly the whole of the intervening time. When they in fact met Edwards had been in good practice as a solicitor and had made a competency. Addressing Johnson, he gave expression to the famous observation, "You are a philosopher, Dr. Johnson. I have tried, too, in my time to be a philosopher; but I don't know how, cheerfulness was always breaking in". Burke, Sir Joshua Reynolds, and other eminent men to whom Boswell mentioned this remark of Edwards thought it an exquisite trait of character. But although recognising that it was indeed exquisite, we are more interested at the moment with Edwards's profession, that of law, for it led up to a further remark by Edwards that Johnson, too, should have been of a profession. This led Johnson to say, "Sir, it would have been better that I had been of a profession. I ought to have been a lawyer." Sir William Scott, whom we best remember as Lord Stowell, took the same view, saying about the same time "What a pity it is, sir, that you did not follow the profession of the law. You might have been Lord Chancellor of Great Britain, and attained to the dignity of the peerage; and now that the title of Lichfield, your native city, is extinct, you might have had it." Upon this Johnson seemed much agitated and, in an angry tone, exclaimed, "Why will you vex me by suggesting this when it is too late?"—*L.T., 1938, p. 141.*

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*Dr. Scott and Dr. Johnson.*—Scott, whom, as already said, we best know as Lord Stowell, early became acquainted with Johnson, the two having been brought together through their common

friend, Robert Chambers, and it was on a visit to the latter that Johnson got to know Scott. We are told that on Chambers proceeding to India to take up his appointment as a judge, Scott "seemed to succeed to his place in Johnson's friendship." How close was the friendship between them is further exemplified by the fact that Scott accompanied Johnson as far as Edinburgh on the famous trip which gave us Johnson's Journey to the Western Islands and Boswell's Journal. It will be remembered, too, that it was Scott who, on its being mentioned in the course of conversation between them that Addison wrote some of his best papers in the *Spectator* when warm with wine, remarked in confirmation of the likelihood of the story, that Blackstone, a sober man, composed his Commentaries with a bottle of port before him, and found his mind invigorated and supported in the fatigue of his great work, by a temperate use of it. This story got round to Blackstone's family on the publication of Boswell's book, and they did not relish it; indeed, so much did they resent it, that Scott thought it prudent to write and apologise although in his view there was nothing derogatory in the anecdote. But we can well understand that the family did not like the stimulus of port in the composition of the Commentaries being blazoned so prominently in the pages of Boswell. Both Stowell and Eldon liked port and each, we are told, took a great deal of it. Someone having asked Eldon if his brother took much exercise, received for answer, "None, but the exercise of eating and drinking." We all know Scott's eminence as a great master of admiralty law, which he expounded in a long list of notable cases, but is it remembered that among his other literary achievements was a large number of sermons? According to his brother, Lord Eldon, "no clergyman ever wrote as many sermons as Lord Stowell. I advised him to burn all his manuscripts of this kind. It is not fair to the clergymen to have it known he wrote them." Johnson frequently employed himself in the same way, saying on one occasion that he had composed about forty sermons. Modern judges have not, we understand, shown the like predilection for sermon writing.—*L.T., 1938, p. 141.*

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*Villainous Saltpetre.*—The apology for science with which Lord Rayleigh concluded his Presidential Address on Wednesday of last week to the British Association is interesting for the memories it revives of the part played in the European War by Lord Moulton. Lord Moulton was one of the leading lawyers of recent times, but it so happened that his aptitude for science was still greater, and when the War broke out his services were promptly requisitioned to increase the manufacture of high explo-

sives. He became the chairman of a small committee on high explosives which first met on November 15, 1914. At the end of the year the organisation he created became a branch of the War Office, and his efforts to secure supplies of toluene and tri-nitro-toluene—known familiarly as T. N. T.—were so successful that from a ton a day Lord Moulton raised it before the end of the War to over a thousand tons a day. To this had Shakespeare's "villainous saltpetre", in the well-known lines which Lord Rayleigh quoted, grown. "During the great War itself," he said, "few scientific men in any country doubted that it was their duty to do what they could to apply their specialised knowledge to the purposes of war. Of such duty Lord Moulton was a conspicuous example, and in the House of Lords, on the occasion of his death in 1920, Lord Birkenhead, then Lord Chancellor, said that but for Lord Moulton's services he greatly doubted whether it would have been possible for the War to have been brought to a conclusion when it was. While, however, Lord Rayleigh's address was a refutation of the special responsibility of science for "frightfulness, it is equally a call to civilisation to stop this perversion to devilish ends of the beneficent purposes of man's inventions.—*L. J., 1938, p. 137.*

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*Noise.*—There are few subjects on which people differ so much as the subject of noise. One has only to hear an ordinary Chancery action for restraining dog-keepers, or poultry-keepers, or schoolmistresses who teach children music, to realise that fact. It is, however, undoubtedly true that the age in which we live is becoming more and more noisy. The motorist is a serious offender; the aviator is fast becoming a nuisance, and now, of course, we have the "radio-fan," or, rather, radio-fiend, who is, we think, the worst of all. He is usually static with his receiver and continues listening to "jazz" or *Nachtmusik* from a continental band long after midnight. We have no doubt that the by-law making powers of local authorities under S. 249 of the Local Government Act, 1933, are sufficient to enable them to deal with the radio-fiend. Councils should be careful in drafting their by-law and insert the words "to the annoyance of persons in the neighbourhood" or something of that kind. Otherwise, as the authorities show, they may be condemned as too wide. *Johnson* v. *Croyden Corporation*, 16 Q.B.D. 708 and *Booth* v. *Howell*, 53 J.P. 678, should be looked up on this point. It is more difficult to deal with the motorist, who generally moves with his noise; but the Minister might do something to stiffen his Construction and Use Regulations, which are not strict enough on this point.—*L.J., 1938, p. 137.*

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*Johnson Supplies Arguments to Boswell.*—In our study of Boswell's famous book we are not allowed to forget that the biographer was a member of the Bar and that he had a certain amount of practice in Scotland although his endeavour to succeed at the English Bar was doomed to failure. But in the one or two cases which came from Scotland to the House of Lords the assistance of Johnson in the preparation of the argument to be presented by Boswell was invoked. There was one notable case in which a long statement was dictated by the Doctor as to the right of a school-master to administer corporal punishment to his pupils. In this Johnson insisted on the view which would scarcely be likely to find favour in these days, namely, that children, being not reasonable, can be governed only by fear, and to impress this fear is one of the first duties of those who have the care of children. In the same strain, he went on to urge that "a stubborn scholar must be corrected till he is subdued. The discipline of a school is military". There must be either unbounded licence or absolute authority. Unless the House was disposed to accept this view of a school-master's authority and duty there was little hope of the school-master succeeding in his appeal from his dismissal on the ground of cruelty to his scholars. Boswell was led by Andrew Crosbie, a prominent member of the Scots Bar, who, according to Lord Stowell, was the only man who was disposed to stand up to Johnson, and who has the further distinction of being by some identified as the prototype of Counsellor Pleydell in Guy Mannering. In the argument attributed to him we read that even were it true that the schoolmaster had been provoked to use rather more severity than he intended, it might well be justified on account of the ferocious and rebellious behaviour of the scholars, some of whom cursed and swore at him, and even went so far as to wrestle with him, in which case he was under the necessity of subduing them as he best could. This was the schoolmaster's account, but the proof led in the Court of Session showed that "scarce a day passed without some of the scholars coming home with their heads cut, and their bodies discoloured". The House reversed the Court of Session, holding that the schoolmaster had exceeded the limits of moderate chastisement. Curiously enough, this particular schoolmaster seems to have conjoined with teaching and chastising his scholars the trade of cattle grazing and farming, shipping, and herring fishing; obviously a versatile man, so that he could turn to one of his alternative callings when his school-mastering came abruptly to an end by the decision of the House of Lords.—*L.T.*, *1938, p. 160.*

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*Boswell and Westminster Hall.*—In a conversation with Johnson in 1777 regarding the chances of success at the English Bar, if Boswell decided to try his fortune there, Johnson advised him not to indulge too sanguine hopes, going on to add that a very sensible lawyer had told him (Johnson) that there were a great many chances against any man's success in the profession of the law; that the candidates were nemerous and those who were successful in building up a large practice few; that it was by no means true that a man of good parts and application was sure of getting business, and that the great risk was that a man might pass half a lifetime in the Courts and never have an opportunity of showing his abilities. Commenting on this, Boswell found that the picture drawn by Johnson's friend was too true. Later, in one of his letters to his friend Temple he said that he saw not the smallest opening at Westminster for him. In another letter to the same correspondent he tells him that his chambers cost him £20 yearly, while his furniture and the salary of a lad to attend there occasionally, another £20, but he sorrowfully adds: "I doubt whether I shall get fees equal to the expense". His chambers were for a time in Farrar's Building—not, of course, the present structure, but its predecessor in title—but the fact that he had chambers and for a time was assiduous in his attendance in Westminster Hall brought him no business, and his only compensation came in the fame of the book through which, in desultory fashion, we have been perambulating, a work which won for him an assured place among the supreme masters of English biography.—*L.T., 1938, 161.*

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*Johnson's Dicta on Law and Lawyers.*—In concluding these desultory excursions through Boswell's fascinating work we would merely recall two further conversations between him and his mentor, one relating to the correctitude from the moral point of view of a lawyer attending consultations on Sunday; the other, regarding the place which law fills in the social system. On the first of these he was invited to give his views by Boswell, whereupon Johnson said: "When you are of consequence enough to oppose the practice of consulting on Sunday, you should do it; but you may go now. It is not criminal, though it is not what one should do who is anxious for the preservation and increase of piety, to which a peculiar observance of Sunday is a great help. The distinction is clear between what is of moral and what is of ritual obligation." On the second topic it is comforting to read that in Johnson's opinion "the law is the last result of human wisdom acting upon human experience for the benefit of the public". So

lawyers generally may pat themselves on the back for being such excellent fellows!—*L.T., 1938, p. 161.*

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*The Dominions and War.*—We still hope, and hope with confidence, that the time when this country will again have to declare war is far distant. But, as an academic matter, the question whether a declaration of war by the British Government would automatically involve the whole Empire in war is often discussed. Quite lately the Prime Minister and Deputy Prime Minister made an important contribution to the discussion by statements made in the House of Assembly at Cape Town. They agreed that if Great Britain declared war South Africa would not *ipso facto* become involved as a belligerent as was the case in 1914. But they differed as to the course they proposed to take in the unhappy event of an Imperial declaration of war. The Prime Minister said that if he was in office at the time he would in all cases advise the Crown in South Africa to support and join in the Imperial declaration. His Deputy did not go so far. He refused to bind himself in advance, and declared that, if the contingency arose, the Parliament of South Africa must decide whether to join in the war or not. We can find no authority in the Statute of Westminster, or anywhere else, for saying that South Africa will not be at war if the Imperial Government declares it. Any resolution to the effect that South Africa will remain at peace when the Imperial Government declares war would be a Declaration of Independence and nothing less.—*L. J.. 1938, p. 165.*

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*Murder from the Air.*—The most pressing requirement in International Law at the present time is the abolition of aerial bombing. In a leading article, under the heading "Death from the Air", the *Times* of February 4 of this year said: "The horrors attending the use of this weapon in Spain and China show that if civilisation is not to be utterly destroyed in some future conflict the only safe thing is to prohibit its use altogether." As to that there is no doubt general agreement, but till this result can be attained aerial warfare should be subject, like other forms of warfare, to rules restraining its excesses and confining its operations to strictly military purposes. In the House of Commons, on June 14 of this year, the Prime Minister, referring to attacks upon ports and shipping in Spain, said: "There is no precedent for these attacks from the air, because aircraft were not previously developed. This action gives rise to a series of new problems in regard to which previous experience is not available." In a sense that is true. But

the analogy between bombardment from the sea and bombardment from the air is sufficiently close to make it relevant to refer to Convention IX of the Hague in 1907, to which all the Great Powers were parties. This forbade the bombardment of ports, towns, villages, dwellings or buildings which are not defended; and though for military reasons certain qualifications were made, yet the commander was to take all measures required to cause as little damage to the town as possible. At the Hague Conference of 1907 Sir Edward Fry was one of the British delegates, and even then, in the course of debates in which he took a leading part, he referred to the crushing burden of competitive armaments. The ultra competition of these times was not foreseen.—*L.J., 1938, p. 193.*

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*Geneva and Aerial Warfare.*—An attempt to establish rules for aerial bombardment was made when, under a resolution passed at the Washington Conference in February, 1922, a Commission was appointed, representing the British Empire, the United States, France, Italy, Japan and Holland, to consider whether existing rules covered new methods of warfare introduced since 1907, and if not to report on the necessary changes. The rules which were recommended forbade aerial bombardment for the purpose of terrorising the civilian population, and it was declared that as we have said, aerial bombardment is legitimate only when directed at a military objective. The rules recommended by the Commission have not been formally adopted, but now the work of codifying rules for aerial warfare is being undertaken by the League of Nations, and on Tuesday, according to the League Correspondent of the *Times*, Capt. Wallace, on behalf of the British Government, stated the lines on which this should proceed, namely: (1) to declare the aerial bombardment of civilians illegal; (2) prescribe that the objects of air attack must be capable of identification; and (3) that any attack on definite objects must be carried out in such a manner as to avoid the accidental bombardment of civilian populations in the neighbourhood; and a drafting committee has been appointed to undertake the codification.—*L. J., 1938, p. 193.*

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